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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

JOEL L. WILLIAMS,

Defendant and Appellant.

B202540

(Los Angeles County
Super. Ct. No. TA088861)

APPEAL from a judgment of the Superior Court of Los Angeles County. Paul A. Bacigalupo, Judge. Affirmed in part and reversed in part with directions.

Sylvia Whatley Beckham, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Linda C. Johnson and Robert David Breton, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant Joel L. Williams of burglary, attempted robbery, and assault with a firearm. The jury found true allegations that defendant committed the offenses for the benefit of a criminal street gang and personally used a firearm in the commission of the offenses. Williams raises numerous issues on appeal. We conclude: (1) substantial evidence does not support the gang enhancement, and (2) the trial court erroneously imposed a firearm enhancement for the burglary count on Penal Code section 12022.53 instead of section 12022.5.¹ We affirm the judgment in all other respects.

BACKGROUND

A. Information

The prosecution charged defendant with first degree burglary (§ 459; count one), attempted first degree robbery (§§ 211, 664; count two), and assault with a firearm (§245, subd. (a)(2); count three). The information alleged that defendant committed the offenses for the benefit of a criminal street gang (§186.22) and that he personally used a firearm in the commission of the offenses (§§ 12022.53, 12022.5).² The information further alleged that defendant suffered a prior felony juvenile adjudication for robbery. (§§ 667, 1170.12.) Defendant pleaded not guilty to the charges and denied the special allegations.

B. Prosecution

On December 25, 2006, Troyell Wideman, a college student, was talking with his girlfriend on the porch of her home, located within the Jordan Downs Housing Project (Jordan Downs) in Los Angeles. Defendant walked by Wideman and his girlfriend and returned 15 minutes later demanding that Wideman relinquish a gold “Rolex” necklace

¹ All subsequent statutory references are to the Penal Code.

² As we explain later in the opinion, the firearm enhancement under section 12022.5 applies to all felonies or attempted felonies, whereas the firearm enhancement under section 12022.53 applies only to certain enumerated felonies.

that Wideman was wearing around his neck.³ Wideman refused, and defendant reached into his pocket. Wideman ran into his girlfriend's house, and defendant followed him inside. When they were approximately five feet apart, defendant pointed a semi-automatic handgun directly at Wideman and told Wideman he had 10 seconds to give defendant the necklace. As Wideman stalled for more time, Sabrina Bradford (the mother of Wideman's girlfriend and an occupant of the home) entered the room.⁴ Bradford attempted to wrestle the gun from defendant, and Wideman joined in her efforts. The gun, which was pointed in Wideman's direction, fired and then fell to the ground. Defendant picked up the gun and ran away. No one was injured.

Bradford called the police, and two officers arrived at her home 30 minutes later. Wideman provided the officers with a physical description of defendant. Approximately 10 minutes later, the officers detained defendant at Jordan Downs. When the officers asked Wideman to identify defendant as the assailant, Wideman stated to one of the officers: "There's a lot of those Grape Street guys around here. They know who I am. They know my family. They'll shoot me. I won't ID him. That's not him." Two days later, at his home, Wideman identified defendant as the assailant from a six-pack photographic display. Wideman had known defendant, who was also a resident of Jordan Downs, for at least six years and occasionally spoke with him. Wideman identified defendant as a member of the Grape Street Crips, a gang that operates within Jordan Downs.

Los Angeles Police Officer Christian Mrakich, who monitors and investigates the activities of the Grape Street Crips, testified that defendant was a member of that gang.

Los Angeles Police Officer Daniel Pearce testified as the prosecution's gang expert. When asked about the primary activities of the Grape Street Crips, he listed examples of "killing people, shooting people, robbing, carjacking, stealing cars, selling

³ Defendant's exact words were: "I like that Rolex. Let me have it."

⁴ At the time, Bradford was the long-term girlfriend of "Robert," an older, well-respected member of the Grape Street Crips. Robert lived with Bradford in her home and is the father of Wideman's girlfriend.

narcotics, [and] holding guns, AK-47's." Regarding the gang's criminal activities, Pearce testified: "You name it, this gang has done it."

Pearce testified that defendant's actions benefitted the Grape Street Crips in three respects: (1) Had defendant succeeded in obtaining the necklace from Wideman, he could have sold it for guns or narcotics. (2) Defendant's actions sent a message to Wideman that the Grape Street Crips and its members were willing to use lethal force to obtain whatever they desired. Wideman would relay this threatening message to his family and everyone else who lived at Jordan Downs, which would "create an atmosphere of fear and intimidation in Jordan Downs." This atmosphere of fear and intimidation, in turn, would dissuade residents of Jordan Downs from reporting to the police future crimes committed by the Grape Street Crips. (3) Defendant's stature within the gang would rise because he would brag about how he was "crazy" enough to rob someone who knew him and could identify him. When defendant raises his own stature within the Grape Street Crips, the overall stature of the Grape Street Crips also rises.

Pearce further testified that even though the circumstances of the offenses did not involve gang signs, gang speech, gang colors, or other gang members, the offenses were nonetheless gang-related crimes.

C. Defense

Defendant did not testify and called no witnesses.

D. Verdict, sentencing, and prior felony allegation

The jury found defendant guilty of first degree burglary (count one), attempted first degree robbery (count two), and assault with a firearm (count three). The jury found true the allegations that defendant committed the offenses for the benefit of a criminal street gang (§186.22) and that defendant personally used a firearm during the commission of those offenses (§§12022.53, 12022.5).

Defendant waived his right to a jury trial on the existence of the alleged prior juvenile adjudication. The prosecution introduced as an exhibit a wardship petition alleging that “Williams, Joel, Jr.” committed second degree robbery in September 1, 2005. The same exhibit showed that “Williams, Joel, Jr.” was ordered to remain a ward of the court pursuant to Welfare and Institutions Code section 602, following an adjudication that he committed robbery in violation of section 211, a felony and a “strike offense.” The trial court concluded this was sufficient evidence to prove that defendant had suffered a prior adjudication that qualified as a felony-strike offense.

On count one (first degree burglary), the court selected the midterm sentence of four years. It doubled the sentence to eight years based on the prior felony-strike, and it imposed a 10-year gang enhancement and 10-year firearm enhancement, for a total of 28 years in state prison.⁵ On count two (attempted first degree robbery), the trial court selected the midterm sentence of two years. It doubled the sentence to four years based on the prior felony-strike, and it imposed a 10-year gang enhancement and 10-year firearm enhancement, for a total of 24 years in state prison. On count three (assault with a firearm), the court selected the midterm sentence of three years. It doubled the sentence to six years based on the prior felony-strike, and it imposed a 10-year gang enhancement and a four-year firearm enhancement, for a total of 20 years in state prison. The trial court stayed the sentence for counts two and three.

DISCUSSION

A. Section 186.22 gang enhancement

Defendant contends substantial evidence does not support the section 186.22 gang enhancement.

⁵ The transcript indicates that the trial court imposed the sentence enhancement under section 12022.5, subdivision (b). However, the abstract of judgment reflects a 10-year sentence enhancement under section 12022.53, subdivision (b).

In reviewing the sufficiency of the evidence, the question on appeal is whether there is evidence from which a reasonable trier of fact could have found the prosecution sustained its burden of proving the defendant guilty beyond a reasonable doubt. (*People v. Hill* (1998) 17 Cal.4th 800, 848-849.) “In making this determination, we ““must view the evidence in a light most favorable to respondent and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.”” [Citation.]” (*People v. Rayford* (1994) 9 Cal.4th 1, 23.) We also must examine the entire record, not merely “isolated bits of evidence.” (*People v. Upsher* (2007) 155 Cal.App.4th 1311, 1322.) Substantial evidence is that which is “““reasonable, credible, and of solid value.””” (*People v. Bradford* (1997) 15 Cal.4th 1229, 1329.) Although all reasonable inferences must be drawn in support of the judgment, we “may not ‘go beyond inference and into the realm of speculation in order to find support for a judgment. A finding . . . which is merely the product of conjecture and surmise may not be affirmed.’” (*People v. Memro* (1985) 38 Cal.3d 658, 695.)

Section 186.22, subdivision (b)(1) provides, “[A]ny person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members” shall be subject to additional punishment as further defined in section 186.22, subdivision (b). (§ 186.22, subd. (b)(1); see also *People v. Gardeley* (1996) 14 Cal.4th 605, 617.) Both parties agree the pertinent analysis in this case is whether substantial evidence supports the jury’s finding that defendant committed the instant offenses for the benefit of the Grape Street Crips.

Here, there was no evidence defendant committed the instant crimes for the benefit of the Grape Street Crips. The defendant did not flash gang signs or yell gang slogans at Wideman when he demanded the gold necklace; the crimes occurred where both defendant and Wideman lived and not in rival gang territory; and the victim Wideman was a college student and not a rival gang member. Defendant simply demanded the gold necklace from Wideman, and, when Wideman refused, he threatened

Wideman with a handgun and gave Wideman a countdown to do as he demanded. Under these facts, defendant was on a “frolic and detour” from the Grape Street Crips.⁶

We reach this conclusion notwithstanding Pearce’s expert testimony. Pearce testified defendant’s actions benefitted the Grape Street Crips because: (1) he could have sold the necklace for guns and narcotics; (2) Wideman would tell the residents of Jordan Downs about the crimes, thus spreading fear and intimidation; and (3) defendant would brag about his crimes, thus increasing his own stature within the Grape Street Crips and also increasing the stature of the gang overall.

Pearce based his opinion on pure speculation without any supporting evidence. The police apprehended defendant within an hour after he unsuccessfully attempted to rob Wideman of his necklace. There was no evidence that defendant had any intention to sell the necklace, nor was there any evidence that he intended to brag about his failed robbery attempt (an attempt thwarted by an older woman) to any of his peers. The expert’s opinion alone was insufficient to establish defendant’s intent as to either of these scenarios. (*In re Frank S.* (2006) 141 Cal.App.4th 1192, 1197 [expert testimony is insufficient to establish “that a specific individual possessed a specific intent”].) Likewise, there was no evidence that Wideman had the opportunity to report defendant’s actions to other residents of Jordan Downs by the time of his arrest. Finally, Pearce’s testimony that defendant’s bragging would increase the stature of his gang converts *every* crime committed by a gang member into one that falls under section 186.22 because any gang member can certainly brag about any crime he or she commits. For these reasons,

⁶ In *People v. Morales* (2003) 112 Cal.App.4th 1176, the court focused on a different inquiry – i.e., whether “evidence that one gang member committed a crime in association with other gang members” was sufficient to satisfy the requirements of section 186.22, subdivision (b)(1). (*Morales, supra*, at p. 1198.) The court’s analysis is nonetheless instructive because it recognized the possibility that one gang member, or several gang members, could commit a crime and “yet be on a frolic and detour unrelated to the gang.” (*Ibid.*) The court went on to conclude that was not the situation before it. (*Ibid.*)

we conclude that Pearce’s testimony, which was based on nothing more than speculation, is insufficient to establish the “benefit” element to justify the gang enhancement.

B. Firearm enhancement

Section 12022.5, subdivision (a) provides that “any person who personally uses a firearm in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for 3, 4, or 10 years.” Section 12022.53, subdivision (b), on the other hand, provides that “any person who, in the commission of a felony specified in subdivision (a), personally uses a firearm, shall be punished by an additional and consecutive term of imprisonment in the state prison for 10 years.” The list of felonies specified in subdivision (a) of section 12022.53 does *not* include burglary.

Both defendant and the Attorney General agree that the trial court pronounced an unauthorized sentence when it imposed a 10-year firearm enhancement on the burglary count pursuant to section 12022.53, subdivision (b). They also agree that the trial court should have imposed a firearm enhancement under section 12022.5, subdivision (a). They disagree, however, on how this court should remedy the error. Defendant contends this court should reduce the firearm enhancement to the midterm of four years pursuant to section 12022.5 on count one, stay the term for count one, and lift the stay on count two. The Attorney General maintains that we should remand the case for resentencing by the trial court. We agree with the Attorney General.

“When a court pronounces a sentence which is unauthorized by the Penal Code, that sentence must be vacated and a proper sentence imposed whenever the mistake is appropriately brought to the attention of the court.” (*People v. Massengale* (1970) 10 Cal.App.3d 689, 693.) “When the mistake is discovered while the defendant’s appeal is pending, the appellate court should affirm the conviction and remand the case for a proper sentence.” (*Ibid*; accord *People v. Ross* (1994) 28 Cal.App.4th 1151, 1160 [where trial court imposes unauthorized sentence, appellate court should remand for resentencing if there is a “need” for the “exercise of any discretion”].) Here, choice of the appropriate

term under section 12022.5, subdivision (a) is within the sound discretion of the trial court, and we therefore remand the case for the court to exercise its discretion. (§1170, subd. (b) [“When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the choice of the appropriate term shall rest within the sound discretion of the court”].) Accordingly, we remand the case for resentencing so the trial court may select among the enhancements available under section 12022.5.⁷

C. Prior felony-strike adjudication

Defendant contends a juvenile adjudication cannot qualify as a prior strike under federal constitutional law because he had no right to a jury trial in the juvenile court. This issue has been considered and rejected by numerous appellate courts in California, including courts in the Second District. (*People v. Buchanan* (2006) 143 Cal.App.4th 139, 141; *People v. Superior Court (Andrades)* (2003) 113 Cal.App.4th 817, 830-834; *People v. Lee* (2003) 111 Cal.App.4th 1310, 1311, 1313-1316; *People v. Smith* (2003) 110 Cal.App.4th 1072, 1075, 1077-1078; *People v. Bowden* (2002) 102 Cal.App.4th 387, 390-394.) We agree with the reasoning of these cases, which we need not repeat, and we therefore summarily reject defendant’s contention.⁸

⁷ We note the following clerical errors that the trial court should also correct upon remand: (1) The abstract of judgment lists as an “enhancement” the additional term imposed under section 1170.12. “The three strikes law “is the articulation of a parallel sentencing scheme for specifically described recidivists.” [Citation.] It is not an enhancement law.” (*People v. Fowler* (1999) 72 Cal.App.4th 581, 584.) Accordingly, the court should strike the enhancement under section three, but leave section four intact, which shows that defendant’s principal term is doubled pursuant to section 1170.12. (2) Although the court imposed the middle term on the attempted robbery count, the abstract of judgment indicates that the court imposed the lower term. (3) Although the court imposed a four-year enhancement for count three under section 12022.5, the minute order reflects a 10-year enhancement for this count.

⁸ The same issue is currently pending before the California Supreme Court in *People v. Nguyen* (S154847), review granted October 10, 2007, in which the majority of the Court of Appeal found the use of a juvenile adjudication as a strike violated *Apprendi v. New Jersey*, *supra*, 530 U.S. 466.

Defendant further contends that substantial evidence does not support the trial court's finding that the prior felony-strike allegation was true. Defendant agrees that he shares the same name and birth date as the minor described in the juvenile court documents evidencing a prior felony adjudication. He contends, however, his "name and birth date are not so unique that it could be reasonably presumed in the absence of proof of matching fingerprints or a photograph, that appellant was the same Joel Williams Jr. or Joel Lee Williams as the minor described in the documents." In *People v. Mendoza* (1986) 183 Cal.App.3d 390, 400, the Court of Appeal rejected a similar sufficiency challenge, holding "[i]t has long also been the rule in California, in the absence of countervailing evidence, that *identity of person may be presumed, or inferred, from identity of name.*" Here, defendant presented no countervailing evidence to rebut the presumption that he is the minor described in the juvenile court documents. We likewise reject defendant's puzzling contention that the prosecution failed to present evidence that the juvenile court actually sustained the allegation of robbery. The dispositional order attached to Williams' wardship petition clearly indicates that Williams committed an "offense declared to be a felony" under "211-PC."⁹

DISPOSITION

The finding under section 186.22 that defendant committed the instant offenses for the benefit of a criminal street gang is reversed, and the matter is remanded to the trial court with directions to dismiss this finding and recalculate defendant's period of confinement. On remand the juvenile court is further ordered to impose a firearm

⁹ Penal Code section 211 defines the offense of robbery.

enhancement on the burglary count pursuant to section 12022.5 and to correct the clerical errors referenced above. In all other respects, we affirm the judgment.

NOT TO BE PUBLISHED.

BAUER, J.*

We concur:

MALLANO, P. J.

ROTHSCHILD, J.

* Judge of the Orange County Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.